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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANTE L. ELLIS,

Defendant and Appellant.

B257362

(Los Angeles County
Super. Ct. No. BA397840)

APPEAL from the judgment of the Superior Court of Los Angeles County.

Lisa B. Lench, Judge. Affirmed as modified.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brenan and Brendan Sullivan, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

In 2013, defendant and appellant Dante Ellis was tried on one count of murder and one count of possession of marijuana for sale. The jury convicted defendant on the possession charge, and found true the firearm and gang enhancements attached to that count. However, the jury did not reach a verdict on the murder charge, and the court declared a mistrial. Defendant was retried for murder in 2014. The second jury found defendant guilty of first degree murder, and also found true the firearm and gang enhancements. Defendant was sentenced to 50 years to life in state prison.

Defendant raises multiple claims of error: (1) the trial court abused its discretion in prejudicially restricting his cross-examination of the prosecution's gang expert, infringing on his constitutional rights to confront witnesses and to due process; (2) the court erred in refusing to dismiss Juror No. 12; (3) the prosecutor committed misconduct during closing argument by repeatedly shifting the burden of proof to defendant; (4) the four-year term for the firearm enhancement related to the possession charge is unauthorized and must be reduced to the statutorily prescribed one-year term; (5) the abstract of judgment contains three clerical errors regarding various court fees; and (6) defendant is entitled to an additional 15 days of custody credits.

Respondent concedes the sentencing issues and that the abstract of judgment should be corrected, but otherwise argues defendant's conviction should be affirmed.

We modify the judgment to reduce the four-year term imposed on count 2 pursuant to Penal Code section 12022, subdivision (c) to a one-year term, award an additional 15 days of custody credits, and direct the trial court to correct several clerical errors reflected in the abstract of judgment. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Our summary of the facts and procedure is taken from the record of the second trial. Factual and procedural issues from the first trial are included only to the extent they are relevant and necessary to discuss the appellate issues raised.

Defendant was charged by information with one count of first degree murder (Pen. Code, § 187, subd. (a); count 1), and one count of possession of marijuana for sale (Health & Saf. Code, § 11359; count 2). It was alleged as to both counts that defendant committed the offenses for the benefit of, at the direction of, or in association with a

criminal street gang within the meaning of Penal Code section 186.22, subdivision (b). As to count 1, it was also alleged defendant personally and intentionally used and discharged a firearm in the commission of the offense, causing great bodily injury to the victim. (Pen. Code, § 12022.53, subds. (b)-(d).) As to count 2, it was alleged defendant was personally armed with a firearm. (Pen. Code, § 12022, subd. (c).) Defendant pled not guilty and denied the special allegations.

The charges arose from a fatal driveby shooting that occurred on April 11, 2012 in South Los Angeles. At the first trial in 2013, the jury found defendant guilty of possession of marijuana for sale (count 2), and found true the gang enhancement and the allegation that defendant was personally armed with a firearm as to that count. The jury was unable to reach a verdict on the murder count and the court declared a mistrial. Retrial on the murder charge began in February 2014. The evidence at the second trial, viewed in the light most favorable to the judgment, revealed the following. (We have summarized only the trial testimony germane to the issues raised and we refer to the witnesses by their initials to protect their privacy.)

1. The Shooting

Around 11:00 a.m. on April 11, 2012, 15-year-old D.J. was on 54th Street in South Los Angeles. At the time, D.J., who had never been involved with gangs, was working with his boss, J.B., just outside J.B.'s business. The sound of gunfire caught D.J.'s attention, and he turned around. He saw a man lying on the sidewalk, about a block away, near the intersection with Arlington Boulevard. The shots continued. He saw a dark-colored Honda or Toyota near the victim. He could see the end of a black gun sticking out of the passenger window of the car, which was headed down the street in his direction. D.J. heard a total of about six shots before the shooting stopped. As the car sped by him, D.J. saw the man sitting in the front passenger seat. The car made a left turn on 8th Street. D.J. later identified the man in the passenger seat as defendant.

Just before the shots were fired, D.J.'s boss, J.B., happened to be looking down the street toward Arlington Boulevard. He saw a dark-colored Honda Accord or Civic come around the corner, then he heard the sound of gunshots, and a man walking on the sidewalk "contorted" and fell to the ground. The Honda started coming down the street

toward him and D.J. at a “rapid speed.” He told D.J. to get inside. J.B. was unable to see anyone inside the car.

J.B. immediately called 911 from his cell phone. D.J. ran down the street to see if he could help. The man who had been shot was Larry Johnson, someone D.J. knew had recently moved to Los Angeles. D.J. tried to lift him, but could not do so. Mr. Johnson had lived close by, and it was not long before his mother and brothers arrived, and the police and an ambulance arrived. D.J. went back to his job. Later on, J.B. provided the police with footage from the surveillance cameras on his place of business. The videotape showed the Honda speeding down the street, but did not show the license plate number or a clear image of the interior of the vehicle.

R.J. was riding his bicycle along 54th Street that morning. While he was stopped at an intersection, he heard about five gunshots. A bus briefly blocked his view, but after it drove off, R.J. looked across the street and saw a black Honda Accord pulling away from the curb quickly. It was headed in the opposite direction down the street from him. There were no other cars on the road at that moment, so R.J. believed the gunshots had come from that Honda. R.J. saw the driver of the car, and he was smiling, like he was “having fun.” He believed the driver, who was a 20-something black male, was the only one in the car. R.J. called 911. R.J. later identified defendant as the person that looked “closest” to the person he saw in the car.

Al Navarro, an officer with the Los Angeles Police Department (LAPD), was on patrol at the time of the incident and responded to the scene. As he arrived, he saw Mr. Johnson on his back on the sidewalk outside a liquor store, with blood coming out of his chest, and two people performing chest compressions. Officer Navarro called for backup units to assist in marking off the area to preserve the crime scene. He also went inside the liquor store and obtained its surveillance video. The footage showed a black Honda with chrome rims leaving the scene.

Mr. Johnson died from the multiple gunshot wounds he received, including two in his torso and one in his upper leg.

2. The Investigation

Detective Young Mun was assigned to investigate the shooting. Based on the witness statements and the video footage obtained from both J.B. and the liquor store, Detective Mun identified the suspect vehicle as a two-door, dark-colored Honda. He worked with the gang division to identify possible suspects associated with similar vehicles. The gang division provided copies of two Field Identification cards prepared in response to two recent traffic stops of defendant, who was driving a two-door, dark-colored Honda both times. A check of Department of Motor Vehicle registration records verified that defendant was the registered owner of a black 2001 Honda as of April 3, 2012.

In early May 2012, Detective Mun showed D.J. and R.J. a six-pack photographic lineup containing a photograph of defendant. D.J. and R.J. identified defendant as the person each had seen in the Honda.

Defendant was arrested on May 17, 2012, in a motel room where police recovered, among other things, a nine-millimeter handgun, ammunition, 43 grams of marijuana, a weighing scale and about \$1,200 in cash.

3. The February 2014 Trial

During pretrial discussions, the prosecutor moved to preclude defendant from cross-examining its gang expert about the general crime statistics published by the LAPD on its website: lapdonline.org. In the first trial, defendant had been allowed to use the crime statistics during cross-examination of the prosecution's gang expert, specifically with respect to his opinion about the primary activities of the Rolling 60's Neighborhood Crips gang (hereafter "Rolling 60's"). After allowing lengthy argument, the court found the statistics to be irrelevant to the primary activities question, and that introduction of the statistics would likely result in an undue consumption of time. The court permitted defendant to cross-examine the expert about the data upon which his opinions were based, but that could not include references to the general crime statistics published on the LAPD's website. We reserve a more detailed recitation of the relevant facts to part 1 of the Discussion below.

In addition to describing the shooting he witnessed, D.J. testified that he did not identify defendant at the preliminary hearing as the person he saw in the Honda because he was scared by defendant and several of his family members staring at him. D.J. said that on his way out of the courtroom after the hearing, he spoke to Detective Mun and told him he was scared to identify defendant in court because he felt threatened. He told Detective Mun that shortly after he had spoken to the police about the shooting, he was walking past a grocery store in his neighborhood when two black males pulled up in a black Ford truck and jumped out. One of them asked D.J. if he was the guy who had “snitched” on his brother. He said no and ran away as quickly as he could.

R.J. conceded he did not identify defendant at the preliminary hearing because he was concerned for his safety. He said he was still reluctant to testify, but he confirmed the fact he had identified defendant in the six-pack photographic lineup Detective Mun had shown him. He explained he was not “100 percent sure,” but defendant looked like the person he saw in the Honda leaving the scene of the shooting.

S.J. testified that he was a former 17-year member of the Rolling 60’s gang and a paid informant for law enforcement. In May 2012, S.J. agreed to assist Detective Mun in his investigation of the shooting. S.J. said he was fitted with both video and audio recording devices and placed in a holding cell with defendant to attempt to have a conversation with him, for which he received \$300. S.J. spoke with defendant about where they were from and why they were in jail. The recordings were played for the jury during S.J.’s testimony, and transcripts of their conversation were also provided to the jury.

Defendant told S.J. he had been charged with murder and that the police had found a gun and marijuana in the motel room where he was staying. When S.J. asked defendant why he had not gotten rid of the gun, he said “[i]t’s a whole different burner.” S.J. said “[t]hey ain’t catch you with the blower. The blower gone.” Defendant responded, “[l]ong gone – been gone.”¹ Later on, defendant complained to S.J. about the cameras on

¹ During his testimony, S.J. explained that the terms “burner” and “blower” meant gun.

the streets. He then said, "I know they got my car turning a corner. That's the only thing I did was turn the corner." Shortly thereafter, defendant told S.J. that the only thing the police showed him was "a picture of my car," which did not show the inside of the car or the license plate.

The prosecution called Officer Gilberto Gaxiola as its gang expert. Officer Gaxiola said he had testified at least a hundred times as a gang expert, and one of the gangs in which he had expertise was the Rolling 60's gang, a predominantly African-American gang. Another African-American gang, the Van Ness Gangster Bloods, is a longtime rival of the Rolling 60's. The shooting of Mr. Johnson took place in the "heart and soul" of the territory claimed by the Van Ness Gangster Bloods.

Officer Gaxiola attested to various aspects of gang culture generally, and also described the symbols, hand signals and color (blue) commonly associated with the Rolling 60's gang. He said the gang consisted of approximately 1,200 members. Officer Gaxiola explained that gang members often go by nicknames or "monikers." Officer Gaxiola said that he was personally familiar with defendant from prior encounters with him in Rolling 60's territory. Defendant had admitted his gang membership and was known by the moniker "Baby Lefty."

When asked about the primary activities of the Rolling 60's gang, Officer Gaxiola identified the following crimes: "robberies, street robberies, bank robberies, burglaries, drive-by shootings, murders, vandalism." He also included mayhem, "carrying weapons" and narcotics sales. Officer Gaxiola attested to several predicate offenses committed by documented Rolling 60's gang members, including a June 2011 arrest of a Rolling 60's member on two counts of assault with a deadly weapon and two counts of robbery, a December 2010 arrest of another member for carrying an unregistered firearm, and a March 2008 arrest of another member for assault and attempted murder. Officer Gaxiola testified that he was the gang expert in each of those cases and was also either involved in the investigation of the crimes or was the arresting officer. In response to a hypothetical based on the facts of the shooting, Officer Gaxiola opined that such a shooting was gang related.

Officers Abel Estopin, Joshua Juneau and Fred Williams testified to prior contacts with defendant in which he admitted his gang membership in the Rolling 60's gang and that his moniker was "Baby Lefty."

Defendant did not testify and did not call any defense witnesses.

During closing argument, the prosecutor made references to the lack of evidence supporting the defense. Defendant did not object, but following the conclusion of the prosecutor's rebuttal argument, defendant moved for a mistrial, arguing that two of the prosecutor's references were improper and shifted the burden of proof to him to prove his innocence. The court denied the motion, explaining that its sua sponte reinstruction on the burden of proof at the end of the prosecutor's rebuttal cured any possible prejudice. We reserve a more detailed recitation of the relevant facts to part 3 of the Discussion below.

4. Juror No. 12

After closing arguments, the jury retired to the jury room shortly before 4:00 p.m. A few minutes later, the bailiff went to speak with the jurors about their return in the morning. Juror No. 12 approached the bailiff and told him she had some concerns about a female member of the audience. She requested that he walk her to her car and he did so. The following morning the court, in the presence of counsel, questioned Juror No. 12 about her concerns and whether she could remain a fair and impartial juror. She stated that she could do so and the court declined defendant's request to remove her from the jury. We reserve a more detailed recitation of the relevant facts to part 2 of the Discussion below.

5. The Verdict and Sentencing

The jury found defendant guilty of the first degree murder of Mr. Johnson. The jury also found true the allegation that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang, and that defendant personally used and discharged a firearm in the commission of the offense, causing great bodily injury to the victim.

On July 3, 2014, the court sentenced defendant to a state prison term of 50 years to life, calculated as follows: 25 years to life on the murder charge (count 1), plus a

consecutive 25-to-life term for the firearm enhancement pursuant to Penal Code section 12022.53, subdivision (d). Defendant was sentenced to a concurrent nine-year term on the possession charge (count 2), consisting of a two-year midterm, three years for the gang enhancement, and four years for the firearm enhancement pursuant to section 12022, subdivision (c).

The court ordered defendant to pay a \$5,000 victim restitution fine to the Victim Compensation Restitution Board on count 1, and a \$50 lab fee pursuant to Health and Safety Code section 11327.5, subdivision (a) on count 2. The court imposed per count court security fees of \$40 (Pen. Code, § 1465.8), criminal assessment fees of \$30 (Gov. Code, § 70373), and parole revocation fines of \$300 (Pen. Code, § 1202.4, subd. (b)). The court imposed and stayed \$300 parole revocation fines (Pen. Code, § 1202.45). Defendant was awarded 763 days of custody credits consisting of actual days and no conduct credits.

This appeal followed. We requested and received supplemental letter briefing from the parties regarding the alleged clerical errors in the abstracts of judgment.

DISCUSSION

1. The Gang Expert

Defendant contends the trial court abused its discretion in restricting his cross-examination of the prosecution's gang expert, Officer Gaxiola. Defendant contends the court's ruling violated his constitutional rights to due process of law and to confront witnesses. We disagree.

“The constitutional right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility. [Citation.] However, the confrontation clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense wishes. [Citation.] Judges retain wide latitude to impose reasonable limits on cross-examination. [Citation.] *Confrontation rights are not violated unless a defendant shows that the prohibited cross-examination would have produced a significantly different impression of the witness's credibility.*” (*People v. Szadziwicz* (2008) 161 Cal.App.4th 823, 841-842, italics added (*Szadziwicz*); accord, *People v. Hillhouse* (2002) 27 Cal.4th

469, 494; see also Pen. Code, § 1044 [“It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved”].)

The trial court did not infringe on defendant’s right to cross-examine Officer Gaxiola as to the materials, hearsay or otherwise, upon which he based his opinions. In seeking admission of the crime statistic evidence, defendant argued he wanted to show that Officer Gaxiola’s opinion about the primary activities of the Rolling 60’s gang, based only on hearsay conversations with other officers, was inconsistent with, and not as reliable as, the crime statistics maintained by the LAPD.

The court asked defense counsel how the statistics were relevant to Officer Gaxiola’s opinions. Defense counsel responded that he wanted to show that the expert’s opinion about the primary activities of the gang was not supported by the statistics. The court inquired if the crime statistics showed “any relation to gang activity.” Defense counsel conceded the website did *not* do so. Defense counsel explained that the website showed only total arrests for precincts throughout the city. Defense counsel reiterated that he just wanted to be able to question the source of the expert’s data as to the primary activities of the gang. The court explained that defendant was “absolutely” allowed to cross-examine the expert about the bases for his opinions, but that the court did not “see the relevance of crime statistics generally.”

The prosecutor argued that there are limits to the type of evidence that is properly received on the issue of an alleged gang’s primary activities, and that it would not be proper to utilize all crime statistics for an entire precinct or the city. To do so would create “a mini-trial on the gang as a whole, rather than focusing on the defendant’s conduct.”

After allowing further argument, the court ruled that the crime statistics were not relevant and would be not admitted. “The only relevance of primary activities is to establish that the Rolling 60’s is a criminal street gang as defined by statute. . . . [¶] . . . We are not going to spend hours on crime statistics in an attempt to refute that the Rolling 60’s is a criminal street gang. That’s the only relevance of primary activities.”

There is nothing in the court's ruling that limited defendant's right, or ability, to effectively cross-examine Officer Gaxiola and attempt to discredit his opinion by questioning the validity of the information upon which he relied. The court's ruling was narrow, precluding only the questioning of Officer Gaxiola about the general crime statistics published on the LAPD's website, which even defendant conceded did not differentiate for gang-related crimes.

Defendant nonetheless argues that he was improperly precluded from demonstrating that Officer Gaxiola's opinion was based on hearsay "without any attempt to consider the actual data compiled by the LAPD." The argument is without merit. Defendant conceded the general crime statistics did not include information regarding gang activity or involvement. The "actual data" defendant wanted to use, by his own admission, was simply compilations, per precinct, of total arrests, and not related to the specific crimes and activities of the Rolling 60's gang. We find no fault with the trial court's assessment that such evidence was irrelevant to Officer Gaxiola's opinion as to what crimes constituted the primary activities of the Rolling 60's gang. Defendant has not explained how the use of such evidence in cross-examination would reasonably have resulted in the jury being given a "significantly different impression" of Officer Gaxiola's credibility. (*Szadziejewicz, supra*, 161 Cal.App.4th at pp. 841-842.) The evidence would have resulted in an undue consumption of time on an irrelevant point, and the trial court did not err in so concluding.

2. The Refusal to Remove Juror No. 12

Defendant contends the trial court erred in failing to remove Juror No. 12 because her comments revealed a demonstrable bias and fear of defendant that warranted her removal. We are not persuaded.

" 'Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a 'demonstrable reality.' The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence. [Citation.]' [Citations.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 807; accord, *People v. Martinez* (2010) 47

Cal.4th 911, 943; see also *People v. Barnwell* (2007) 41 Cal.4th 1038, 1053 [reviewing court affords deference to the trial court's factual and credibility determinations as to whether a juror has exhibited a disqualifying bias, because the trial court has the benefit of firsthand observation of the juror's statements and demeanor].)

On the first day of the jury's deliberations, Juror No. 12 informed the bailiff she was concerned about the conduct of a female member of the audience that she perceived to be threatening. At her request, the bailiff walked her to her car when she left the courthouse that afternoon.

The next morning, before the lawyers had arrived, the court spoke with Juror No. 12 outside the presence of the other jurors. The following colloquy took place.

"THE COURT: . . . I understand you had a conversation with my bailiff yesterday. I want to talk to you about that once the lawyers are here. Okay? But I'm going to let you go back to the jury room. You just need to understand that you cannot say anything about the subject matter of what you spoke to the bailiff about yesterday with the other jurors. Okay?"

"JUROR NO. 12: Absolutely. I had mentioned it to the bailiff when I was in the jury room with the jurors, but I haven't said anything."

Once counsel arrived, the court advised them of the circumstances and it was agreed that the court would question Juror No. 12 about the specifics of her concerns outside the presence of the other jurors. Juror No. 12 explained her concerns as follows: "I think my concerns certainly started when [defense counsel] mentioned, when we were all being interviewed for jury duty, wouldn't you be intimidated if you saw a crowd of gang members in the audience? Which I thought, that's an interesting piece of information to get under all of our skin, which I think it did. [¶] . . . And I was looking at the audience. And I was watching the girl with the long dark hair flick her hair back and expose a pair of earrings, probably plastic, but they were a pair of open scissors And they were about four inches long. [¶] It was pretty dramatic. To me, they are a weapon. So I felt that that's a little bit of a subtle message, but it's a message. And it certainly made me feel like, I don't know, are you sending a message, am I supposed to be afraid? I'm a little concerned here."

The court told Juror No. 12 that the main issue was whether or not Juror No. 12 believed that what she saw would impact her ability to be a fair and impartial juror. Juror No. 12 answered “no.” The court explained, “I’ve never heard of an instance of a juror being harmed. I mean it happens on television, but I’ve never seen it. [¶] . . . [¶] By the same token, it really may not matter if you already are feeling concerned in a way that will impact you. So I really need to know whether or not you believe that what you saw and how you interpreted it is going to impact your ability to continue as a fair and impartial juror in this case.”

Juror No. 12 responded: “No, I don’t think it will impact it at all. I was just concerned.” The court went on: “So I hope that you understand that it is your obligation to ignore the things that go on in the courtroom or outside the courtroom when -- other than what the testimony is and the evidence is. And it sounds like your ability to do that is to make that distinction.” Juror No. 12 said “[t]otally.” The court then allowed Juror No. 12 to return to the jury room and told her that if she had any further concerns, she should speak to the bailiff.

Defense counsel requested the court to make further inquiries of the jurors about whether Juror No. 12 had mentioned her concern to them and whether they had concerns about any audience members impacting their deliberations. The court declined to make any further inquiries of the jury.

Nothing in the record shows or suggests to a “demonstrable reality” that Juror No. 12 could not dutifully perform her duties as a juror. (*People v. Navarette* (2003) 30 Cal.4th 458, 499-500 [finding no abuse of discretion in court’s retention of juror who expressed some generalized fear for his safety but who appeared to accept the trial court’s reassurance that juror identities and questionnaire responses were kept confidential and the juror did not report an inability to be fair].)

3. The Prosecutor’s Closing Argument

Defendant objects to two statements made by the prosecutor during the rebuttal portion of his argument, contending that both improperly shifted the burden of proof by suggesting defendant was obligated to present evidence to oppose the prosecution’s evidentiary showing. Because our determination of the propriety of the prosecutor’s

argument must be considered in context (*People v. Dennis* (1998) 17 Cal.4th 468, 522), we set forth excerpts of the prosecutor's argument, highlighting with italics the two statements challenged by defendant.

The overall theme of the prosecutor's rebuttal argument was that the defense did not present any alternative theory of the case that was reasonable in light of the evidence. The prosecutor strenuously pointed out that the defense only resorted to perjorative characterizations of the prosecution witnesses. "Granted, [D.J.] got a fleeting glance as the defendant drove by. But there is no question in the world that is the same vehicle as the defendant's. *The defense offers no explanation for the similarities.* [D.J.] saw the defendant as he went by, as he looked back, and caught a glimpse of his face. And that's [the] face he identified in the photo lineup. [¶] And to attribute any ill will or fabrication to [D.J.] is just counsel trying to exonerate his client with no evidence." (Italics added.)

The second statement objected to by defendant occurred a few minutes later: "We have heard evidence, hard binders of evidence. *Is there one defense exhibit?* The People offered – the People's evidence proves beyond a reasonable doubt. And there is nothing in that evidence that points towards anything other than the defendant." (Italics added.)

After the prosecutor concluded, the court instructed the jury with its final instructions, beginning with a reinstruction on the burden of proof. "Ladies and gentlemen, what I want to remind you, however – I'm not finding it. I told you at the beginning of the trial, and I'm going to remind you, and I don't think there is any question by anything the attorneys said that the People have the burden of proof in this case. They have the burden of presenting evidence [¶] Defense has no burden to present evidence or prove that [defendant] is not guilty. The only person who has the burden in this trial is [the prosecutor]."

After the jury retired to the jury room, defense counsel advised the court he believed "there seemed to be a point in [the prosecutor's] argument where he was trying to reassign the burden of proof to the defense. And I think that's why the court gave its instructions. [¶] I didn't want to alert the jurors, so I would just be objecting at this point to that. That that was impermissible argument. And that impermissible argument could,

and may, and probably did, lead to the breach of my client's due process rights."

Defense counsel then moved for a mistrial on those grounds.

The court denied the motion, explaining that "to the extent that may have happened, I am not attributing any intentionality to [the prosecutor] on that, and I believe that what I said was sufficient to cure any possibility that his statements could have been mistaken."

While defendant did not object to the challenged statements as they were made (*People v. Morales* (2001) 25 Cal.4th 34, 43-44 (*Morales*)), respondent does not assert forfeiture. We conclude it is appropriate to resolve the merits.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it *infects the trial with such unfairness as to make the conviction a denial of due process*. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the *use of deceptive or reprehensible methods* to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, *when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion*." (*Morales, supra*, 25 Cal.4th at p. 44, italics added; accord, *People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.) In assessing the prosecutor's argument, we must not lose sight of the "presumption that 'the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*Morales*, at p. 47.)

The prosecutor's comments did not amount to prosecutorial misconduct. "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340 [rejecting the defendant's contention that the prosecutor committed misconduct and impermissibly shifted the burden of proof by arguing that the defense had not produced any evidence regarding a blood stain found in the defendant's car, nor presented any alibi witnesses]; accord, *People v. Thomas*

(2012) 54 Cal.4th 908, 939; see also *People v. Szeto* (1981) 29 Cal.3d 20, 34 [acknowledging that a prosecutor may not comment on a defendant's failure to testify, but may make fair "comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses"].)

Here, the prosecutor never asserted that defendant had a duty to produce any evidence. Indeed, the prosecutor, on several occasions, candidly acknowledged that he bore the burden of proof. The prosecutor's argument was an advocate's fair comment on the state of evidence and the lack of evidence pointing to anyone other than defendant as the perpetrator. The prosecutor's comments did not abridge defendant's due process rights, nor is there a reasonable likelihood the jury construed or applied the comments in an "objectionable fashion." (*Morales, supra*, 25 Cal.4th at p. 44.)

Moreover, the trial court reminded the jury after closing arguments that the prosecutor bore the burden of proof and that defendant was not obligated to present any evidence whatsoever. There is no likelihood the jury was misled as to the law regarding the burden of proof, nor is there any showing of prejudice.

4. The Sentencing Issues and the Abstracts of Judgment

Defendant raises the following issues which respondent conceded in its opening brief: (1) the four-year term imposed on count 2 for use of a firearm pursuant to Penal Code section 12022 must be reduced to a one-year term; (2) the custody credits for actual time served were miscalculated and defendant is entitled to an additional 15 days; and (3) the abstract of judgment fails to show that the court imposed a court security fee and a criminal assessment fee on both counts, and fails to reflect the \$50 lab fee imposed on count 2 pursuant to Health and Safety Code section 11327.5, subdivision (a).

a. The firearm enhancement on count 2

We agree that the four-year term imposed on count 2 for the firearm enhancement must be reduced. The statutory language of Penal Code section 12022 is clear. The statute provides for an additional *one-year term* to be imposed for the commission of a felony or attempted felony where one or more principals is armed with a firearm. (Pen. Code, § 12022, subd. (a).) However, subdivision (c) of the statute provides that "[n]otwithstanding the enhancement set forth in subdivision (a), a person who is

personally armed with a firearm in the commission of a violation or attempted violation of Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code shall be punished by an additional and consecutive term of imprisonment pursuant to subdivision (h) of Section 1170 for three, four, or five years.” Defendant was convicted in count 2 of a violation of Health and Safety Code *section 11359*, which is not one of the enumerated statutes. The enhancement on count 2 must therefore be reduced to a one-year term.

b. The custody credits

We also agree defendant is entitled to an additional 15 days of custody credits, consisting solely of actual days. The record demonstrates that defendant was arrested on May 17, 2012 and was sentenced on July 3, 2014. Defendant was therefore entitled to 778 actual days of custody credits. He was only awarded 763. The abstract of judgment must be modified to reflect the correct number of custody credits.

c. The abstracts of judgment

In his opening brief, defendant argued that the abstract of judgment erroneously reflects just a single \$40 court security fee and a single \$30 criminal assessment fee, when it should reflect imposition of fees in the total amount of \$80 and \$60, as the court imposed such fees in accordance with the statutes as to both counts. Defendant also argued that the abstract fails to include the \$50 lab fee imposed on count 2 (Health & Saf. Code, § 11327.5, subd. (a)). Respondent, in its opening brief, conceded the abstract of judgment should be corrected accordingly.

Defendant is correct that the trial court imposed a \$50 lab fee on count 2 which was erroneously omitted from the abstract of judgment. Box 9c on the abstract of judgment for count 2 (form CR-290) should be marked to reflect the fee imposed by the court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [an abstract of judgment “does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize”].)

But defendant is mistaken in asserting the abstracts of judgment incorrectly reflect the court security fees and criminal assessment fees. The abstract of judgment for the sentence on count 2 for possession of marijuana, and the separate abstract of judgment

for the sentence on count 1 for first degree murder each correctly show a \$40 court security fee and a \$30 criminal assessment fee.

Defendant contends, without citing *any* authority, that it would be simpler if the fees were combined in one aggregate total on one abstract of judgment. The fees are properly recorded on the separate abstracts pertaining to each count.

We advised the parties that the \$5,000 restitution fine pursuant to Penal Code section 1202.4, subdivision (f) and made payable to the Victim Compensation Restitution Board is erroneously recorded in box 9b of the CR-290 abstract for count 2 when that amount was imposed by the court as to count 1, and invited a response. The parties agree that the abstracts of judgment should be corrected to properly reflect the court's oral pronouncement. (*People v. Mitchell, supra*, 26 Cal.4th at p. 185.) The \$5,000 restitution fine must be deleted from the CR-290 abstract and recorded only in box 9b of the CR-292 abstract for count 1.

The court's oral pronouncement also appears to reflect the imposition of a per count \$300 restitution fine pursuant to Penal Code section 1202.4, subdivision (b), as well as a \$300 parole revocation fine pursuant to section 1202.45 that was imposed and stayed as to each count. The \$300 restitution fine is only reflected on the CR-292 abstract for count 1. Box 9a of both abstracts should be corrected to accurately reflect the court's order. (*People v. Mitchell, supra*, 26 Cal.4th at p. 185.)

DISPOSITION

The judgment of conviction is modified in the following respects: The four-year term imposed on count 2 pursuant to Penal Code section 12022 shall be reduced to a one-year term; and the total determinate term is reduced from a nine-year term to a six-year concurrent term. Defendant shall be awarded an additional 15 days of custody credits consisting of actual days, for total credits of 778 days. The abstract of judgment must be corrected to reflect the court's sentencing order in the following respects: The \$50 lab fee pursuant to Health and Safety Code section 11327.5, subdivision (a) imposed on count 2 must be recorded in box 9c of the CR-290 abstract. The \$5,000 restitution fine payable to the restitution fund imposed on count 1 must be deleted from box 9b of the CR-290 abstract and properly recorded in box 9b of the CR-292 abstract. Box 9a of both

abstracts must be corrected to reflect the \$300 restitution fines and \$300 parole revocation fines. The superior court is directed to prepare and transmit a modified abstract of judgment to the Department of Corrections and Rehabilitation forthwith.

The judgment is otherwise affirmed as so modified.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.